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THE CONSTITUTIONALITY OF THE RECIPROCITY CLAUSE OF THE McKINLEY TARIFF ACT.

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Ever since the McKinley Tariff Act received the assent of the President, suggestions have been from time to time made that its reciprocity clause was unconstitutional in that it delegated legislative power to the Executive Department of the Government.

If the act does in fact make such a delegation, the objection is a serious one. Mr. Locke said long ago, "The legislature neither must, nor can, transfer the power of making laws to anybody else, or place it anywhere but where the people have."[1] This maxim of political science applies with special force to the Government of the United States, whose Constitution vests "all legislative powers" in the Congress, subject only to the limited veto of the President.

The McKinley Tariff Act, as approved October 1, 1890,[2] places "sugars, molasses, coffee, tea, and hides, raw and uncured," upon the free list.

[1] Civil Government, s. 142. [2] 26 Statutes at Large, 567.

The third section of the act is as follows:

"That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which, in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely."

Then follows a list of duties to be imposed upon the designated articles if the President shall have suspended by proclamation under the third section the provision as to the free introduction of such articles.

The act therefore (1) admits free of duty certain specified subjects of commerce, (2) unless any foreign country exporting such articles to the United States shall impose duties upon the agricultural or other products of the United States reciprocally unequal and unreasonable, (3) the evidence of such imposition of such reciprocally unequal and unreasonable duties being a finding of that fact by the President of the United States, and then (4) the free importation of such articles into the United States shall be suspended, and during such suspension they can only be imported subject to the duties specified in the third section of the act.

The constitutionality of the reciprocity clause can be supported upon three distinct lines of argument.

I.

In Stuart *v.* Laird,[1] the Court said with regard to the right of judges of the Supreme Court to sit as Circuit Judges, that "practice and acquiescence for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

In Briscoe *v.* The Bank of Kentucky,[2] Mr. Justice M'LEAN, in considering the question of the power of a State to charter a bank with power to issue circulating notes, said, "An uniform course of action involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised."

In Martin *v.* Hunter's Lessee,[3] wherein the appellate jurisdiction of the Supreme Court of the United States as exercisable under the twenty-fifth section of the Judiciary Act with reference to final judgments and decrees of State courts of last resort was sustained, Mr. Justice STORY said: "It is an historical fact, that this exposition of the Constitution, extending its appellate power to State Courts, was previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have,

[1] 1 Cranch, 97. [2] 11 Peters, 318. [3] 1 Wheaton, 351.

from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State Courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts."

In Cohens *v.* Virginia,[1] wherein the doctrine of the preceding case was applied in a criminal prosecution of one of its citizens by a State, Chief Justice MARSHALL said, "Great weight has always been attached, and very rightly attached, to contemporaneous exposition;" and he adds,[2] referring to the Judiciary Act, "We know that in the Congress which passed that act were many eminent members of the convention which framed the Constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the case therein specified to be unauthorized by the Constitution. . . This concurrence of statesmen, of legislators, and of judges in the same construction of the Constitution may justly inspire some confidence in that construction."

In Cooper *v.* Ferguson,[3] wherein the question was as to the construction of a statute of the State of Colorado, Mr. Justice WOODS said, "The act was passed by the first legislature that assembled after the adoption of the Constitution, and has been allowed to remain upon the statute book to the present time. It must, therefore, be considered as a contemporary interpretation, entitled to much weight."

These authorities, so clearly recognizing the force of a contemporaneous exposition, and a subsequent legislative and judicial acquiescence as affecting and as determining

[1] Wheaton, 418. [2] Page 410. [3] 113 U. S., 733.

the construction of the Constitution, are applicable to this question.

Some of the legislative precedents are these :

Section 4219 of the Revised Statutes imposed a tonnage duty of two dollars and thirty cents per ton on foreign vessels entered in the United States from any foreign port to and with which vessels of the United States are not ordinarily permitted to trade, on other vessels thirty cents per ton ; "provided that the President of the United States shall be satisfied that the discriminating or countervailing duties of any foreign nation to which such vessels belong, so far as they operate to the disadvantage of the United States, have been abolished;[1] then eighty cents per ton."

Section 4228 of the Revised Statutes provides that the President may issue his proclamation declaring that the discriminating duties of tonnage and imposts are suspended upon satisfactory proof to him that no discriminating duties of tonnage or imposts are imposed or levied in the ports of any nation upon vessels, produce, manufactures of, or merchandise imported from, the United States.[2]

The Act of 1 March, 1817, c. 31,[3] forbids the importation of goods in foreign bottoms, under penalty of forfeiture, but section 2498 provides that "the preceding section shall not apply to vessels or goods, wares or merchandise imported in vessels of a foreign nation which does not maintain a similar regulation against vessels of the United States," and a forfeiture under this statute was sustained in the case of The Merritt, 17 Wallace, 582.

The Act of 6 March, 1866, c. 12, s. 1,[4] forbids the importation of neat cattle and the hides of neat cattle from any foreign country, and power is given to either the President of the United States, or the Secretary of the Treasury, to suspend the operation of the prohibition.

[1] The proviso of this section is a re-enactment of the Act of 31 May. 1830, c. 219 ; 4 Statutes, 425.

[2] This section is a re-enactment of the Act of 24 May, 1828; 4 Statutes, 308.

[3] 3 Statutes, 351 ; Revised Statutes, s. 2497.

[4] 14 Statutes, 3 ; Revised Statutes, s. 2493.

The Act of Congress of 9 July, 1846,[1] provided for the submission to the qualified voters of the county of Alexandria, in the District of Columbia, of the question of retrocession to the State of Virginia, created the machinery of election, and declared that, if a majority of the voters should refuse, the act should be void, and, if a majority of the voters should be in favor of accepting its provisions, it should be in full force, and that the President should then inform the Governor of Virginia of the result of the election, etc., and the retrocession should be accomplished. Under the provisions of the act the election was held, the provisions of the act accepted by the voters, the retrocession made, and no objection was ever suggested as to the constitutionality of the statute.

The Tariff Act of 2 March, 1861,[2] imposed certain duties upon fish and fish oil. The Act of 1 March, 1873, c. 213,[3] provided that whenever the President of the United States shall receive satisfactory evidence that Great Britain and Canada have passed laws to give full effect to the provisions of the treaty of Washington signed on 8 May, 1871, he is authorized to issue his proclamation declaring that he has such evidence, and thereupon certain fish oils and fish shall be admitted free of duty from Canada.

It would be easy to add largely to these citations from the statutes, but those which have been cited are sufficient to show that the reciprocity clause of the McKinley Tariff Act is abundantly supported by legislative precedents, whose constitutionality has not been questioned.

II.

The question is also concluded by direct judicial decision.

In the case of Aurora, 7 Cranch, 382, the facts were, that the Act of 1 March, 1809, forbade importations into the United States from Great Britain or France, or their colo-

[1] 9 Statutes, 35.

[2] Revised Statutes, s. 2504, Schedule F.

[3] 17 Statutes, 482; Revised Statutes, s. 2506.

nies, but the act provided that the President "be, and he hereby is authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation, after which the trade suspended by this act . . . may be renewed, etc. On 19 April, 1809, the President issued his proclamation declaring that Great Britain had so revoked, but that proclamation was subsequently withdrawn. On 1 May, 1810, Congress passes an act, the fourth section of which declared "that in case either Great Britain or France should before 3 March, 1811, so revoke, etc., which fact the President shall declare by proclamation, and if the other nation shall not revoke within three months thereafter, then the Act of 1 March, 1809, shall be revived, etc." On 2 November, 1810, the President issued his proclamation declaring that France had so revoked. An Act of 2 March, 1811, provided that until the President declared by proclamation that Great Britain revoked, the Act of 1 March, 1809, should be in force as regards importations from that country. The Aurora, clearing from Liverpool on 11 December, 1810, sailed on the 16th, and arrived at New Orleans on 2 February, 1811. Her cargo was libelled, and was liable to forfeiture, if the President's proclamation of 2 November, 1810, had in law the force of reviving the Act of 1 March, 1809. It was argued that "the legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted as to the fact upon which the law should go into effect." This view was sustained by the Court, Mr. Justice JOHNSON saying, page 388, "There is no sufficient reason why the legislature should not exercise its discretion in reviving the Act of 1 March, 1809, either expressly or conditionally, as their judgment should direct."

It is difficult to distinguish between the case of "The Aurora" and the question under consideration, and if the reciprocity clause of the McKinley Tariff Act is to be held to be a delegation of legislative power to the Executive Department, and therefore unconstitutional, the case of the Aurora must be overruled.

Those who contend that the clause in question is unconstitutional rely upon those well-known cases, of which Parker *v.* The Commonwealth (6 Pa., 507); Rice *v.* Foster (4 Harrington, 479); and Barto *v.* Himrod (4 Selden, 483), are illustrations, and which hold that a legislature cannot delegate to the people of a State, or of a municipal subdivision of a State, the power of determining whether or not an act of the legislature, as, for instance, an act authorizing the granting of licenses for the sale of liquor, shall be operative in the State, or within any particular political subdivision of the State.

The ground of decision in those cases is, that the delegation of legislative power by the people to the legislature, and to the legislature only, vests exclusively in the legislature the right, and imposes exclusively upon the legislature the duty, of determining not only (1) what the terms of a law shall be, but also (2) whether or not the law shall become operative; and that to permit the people of a whole State, or of a part of a State, to determine whether the law shall become operative is as much a delegation of legislative power as it is to permit them to determine what the terms of the law shall be.

It is obvious that this principle, even if conceded to its fullest extent, has no relevancy to the question under discussion, for, as has been shown, there is not to be found in the McKinley Tariff Act a delegation to the Executive Department of power either to make the law, or to determine, in the exercise of the will of the Executive, whether or not the law shall go into effect, and the delegation, giving it its fullest effect, is only of the ministerial and essentially executive power of finding that fact, upon whose finding the law, as formulated by the legislative will, is to take effect.

But the authority of the anti-local-option cases has been shaken, and some of them have been expressly overruled, by Locke's Appeal (72 Pa., 491); State *v.* Parker (26 Vt., 357); Smith *v.* Janesville (26 Wis., 291), and many other cases.

The Chief Justice of the United States has said, in

Rahrer's case (140 U. S., 561), that "the principle upon which local option laws so called have been sustained is, that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to a municipality or the people to determine some fact or state of things upon which the action of the law may depend."

That dictum, so forcibly and so clearly stated, enunciates the principle, which is conclusive of the question under consideration.

III.

If the question were not concluded by legislative and judicial precedents, and if it were fairly open for argument upon principle, it would not present any serious difficulty.

Mr. Austin[1] has pointed out that the line distinguishing executive and legislative powers cannot in any government be drawn with absolute accuracy; and he adds, "that the legislative sovereign powers and the executive sovereign powers belong in any society to distinct parties is a supposition too palpably false to endure a moment's examination." Especially is this true in the Government of the United States, whose Constitution, while declaring that "the executive power shall be vested in a President," nowhere attempts to define that power. No possible act of legislation is in itself complete and effective until it be administered by the judiciary department, or by the Executive Department, and sometimes by both. For instance, a statute may declare murder to be a crime punishable with death, and may define the crime to be the unlawful and premeditated killing of a human being, but that statute cannot be carried into effect until the crime has been committed, and until the judicial department has determined that the individual charged with the commission of the crime did kill a human being, and did kill that human being, unlawfully and with premeditated intent; or, in other words, before the legislative will, as ex-

[1] "The Province of Jurisprudence Determinated," 207.

pressed in that statute, can be carried into effect, a fact, or a series of facts, must be found by the judicial department.

How does that differ in principle from that finding by the Executive Department which is essential to carry into effect the legislative will, as expressed in the reciprocity clause of the McKinley Tariff Act?

Again, the Constitution has in express terms authorized Congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" but Congress, in its exercise of that constitutional authority, was so jealous of executive usurpation of the power of the sword that, by the Act of February 28, 1795,[1] it empowered the President to employ the army and navy in the suppression of insurrections within any State only "on application of the legislature of such State, or of the Executive, when the legislature cannot be convened."

It is obvious that that act could not be carried into effect unless the President found as a fact, (1) that the legislature of a State had made an application within the terms of the act, or (2) that the legislature of a State could not be convened, and, (3) that that being so, the Executive of that State had made an application within the terms of the act. Wherein does that differ in principle from the question under consideration?

To sum up the whole matter, it can be to the fullest extent conceded that the Constitution forbids the legislative department of the Government to delegate to the Executive, or to any one, that power of legislation which has been vested exclusively in Congress, subject only to the qualified veto of the President; but it cannot be conceded that the clause under consideration does, in fact, delegate legislative power to any one. The analysis printed *supra*, page 66, shows that that which Congress has done has been to declare that certain designated subjects of commerce shall be admitted free of duty, or subject to a rate of duty specified in the act, as the President may or may not find a particular fact, viz., the imposition of reciprocally unequal

[1] 1 Statute, 424; Revised Statutes, s. 5297.

and unreasonable duties by a foreign government. In that there is no delegation of legislative discretion, for it is not left to the Executive Department to determine whether the articles in question shall be admitted free of duty, or subject to duty, nor to fix the rate of duty, if they are to be admitted subject to duty; but the rate of duty is fixed by the act, and the contingency upon which the articles are to be admitted free of duty, or subject to duty, is made by the act to turn not upon the President's will, but upon the President's determination of a fact.

PHILADELPHIA, January 28, 1892.

Court of Appeals of New York.

GEORGE H. TILDEN, RESPONDENT, *v.* ANDREW H. GREEN ET AL., EXECUTORS, APPELLANTS.

Court of Appeals, Second Division, Filed October 27, 1891.

SYLLABUS.

(1) WILLS—TRUST—EXECUTORY DEVISE.

T., by his will, devised the residue of his estate to his executors for two lives in being, and by its thirty-fifth article requested them to procure the incorporation of an institution to be known as the "Tilden Trust," for the purpose of maintaining a free public library and reading-room in the city of New York, and to promote such scientific and educational objects as they might more particularly designate, and authorized them to convey to such institution, if its incorporation was satisfactory, during the lifetime of the survivor of the two lives in being, all the residue of the estate or so much as they deemed expedient. In case the institution was not incorporated during the lifetime of the two persons named, or if for any cause or reason the trustees should deem it inexpedient to convey said residue to, or apply it to the use of, said institution, then they were authorized to apply it to such charitable, educational and scientific purposes as, in their judgment, would render it most widely and substantially beneficial to the interests of mankind. Held, that the devise was invalid, as there was no certain designated beneficiary who could enforce the trust, and it rested entirely in the discretion of the trustees to give such part of the estate as they deemed expedient to the Tilden Trust, or to withhold all from it.